80937-2

No. 80937-2

SUPREME COURT
OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent,

v.

RED OAKS CONDOMINIUM OWNERS ASSOCIATION,
a Washington non-profit corporation,

Petitioner.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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CERTIFICATE OF SERVICE

I, Nancy Boyd, declare that on the date noted below I caused to be delivered via ABC Legal Messengers, Inc. a copy of Respondent's Answer to Petition for Review.

Kenneth Harer
The Condominium Law Group
10310 Aurora Avenue North
Seattle, WA 98133

I Certify Under Penalty of Perjury Under the Laws of the State of Washington that the Foregoing is True and Correct.

Signed in Seattle, WA this 17th day of December, 2007.

/s/*

Nancy Boyd
* Original Signature in File

I. IDENTIFY OF RESPONDENT

The Respondent is Mutual of Enumclaw Insurance Company ("Enumclaw"). Enumclaw asks the Court to deny Appellant's petition.

II. ISSUES PRESENTED FOR CROSS REVIEW

Only if the Court accepts review, Enumclaw petitions for Cross-Review to resolve the following issues:

1. Does the Faulty Workmanship exclusion independently prevent coverage for Red Oaks' claims?

2. Did Red Oaks waive its affirmative defense of bad faith estoppel when it failed to assert it in response to Enumclaw's Motion for Summary Judgment?

III. STATEMENT OF THE CASE

Sundquist is a developer and general contractor for housing, including condominiums. CP 185. At the times relevant to this lawsuit Sundquist was insured by Enumclaw under an Umbrella Liability Policy. CP 186. In the first half of 2003 Sundquist submitted to Enumclaw five separate claims Sundquist was concerned could result in liability. Each of these claims, Red Oaks, Wethersfield, Mill Creek Court, Barrington, and Gold Leaf, was identical for purposes of determining coverage under the Enumclaw policies. CP 44-49, 1091. Each of these projects was suffering from construction defects causing water intrusion. CP 213-215,

1091.

The claims against Sundquist were at varying levels of maturity when Sundquist notified Enumclaw of their existence. Sundquist had engaged in negotiations with each of the claimants hoping to avoid lawsuits. CP 811, 1091. Even though several of the claims, including Red Oaks, had not yet resulted in an action, Enumclaw accepted Sundquist's tender of defense and appointed Sundquist's choice of lawyer, Jeff Frank, of Bullivant, Houser, Bailey to represent Sundquist in the negotiations. CP 44-49, 936 p.10 l. 17 - p. 11 l. 20. Enumclaw reserved its rights, first in a letter relating to the Barrington claim in August, 2003, and later in a letter encompassing all five claims in November, 2003. These letters informed Sundquist of several exclusions, including exclusions for Sundquist's work, and faulty workmanship. CP 1119-1121, 44-49.

Having received the reservation of rights letter for the Barrington claim, and thus fully aware of Enumclaw's position on coverage under the policy presently before the Court, Sundquist voluntarily sought and obtained Enumclaw's approval to enter into an ER 408 Discovery and Tolling Agreement. CP 811, 819-822, 936 p.13 l. 7 – p. 15 l. 16. Sundquist believed the Discovery Agreement was a good defense strategy to minimize its liability and Enumclaw agreed. CP 937, p. 14 l. 2 – p. 15 l. 10. The agreement was executed by Sundquist and Red Oaks - the only

two parties to the agreement - on September 29, 2003. CP 822. Under the agreement Sundquist agreed to fund a joint discovery exercise including the appointment of a neutral expert to determine an appropriate scope of repairs for the Red Oaks buildings. CP 819-822, 937, p. 14 l. 13 – p. 15 l. 7. Bids would then be submitted to construction companies. CP 820. The parties agreed to mediate differences, and failing that to litigate them in arbitration or in court. CP 820-821. Because Enumclaw agreed with Sundquist that the Discovery Agreement was a good tool to limit Sundquist's exposure as part of its defense, Enumclaw agreed to pay the cost of the neutral expert and up to $25,000 of Red Oaks' attorneys fees incurred during the pendency of the Discovery Agreement. CP 821, 937 p. 14 l. 2 – p. 15 l. 10.

On October 29, 2003, Dave Michlitsch of Enumclaw met with Larry Sundquist, Jeff Leghorn (Sundquist's in-house counsel), and Richard Beal (Sundquist's coverage counsel) to discuss the claims against Sundquist. Mr. Michlitsch told Mr. Sundquist and his lawyers that Enumclaw believed there was no coverage for the claims and, as a result, no money was likely to be available to settle them. CP 938, p. 20 l. 17 – p. 22 l. 12.

Apparently as a result of that meeting and the reservation of rights Sundquist immediately sued Enumclaw in a Declaratory Judgment action

on the Barrington claim, which was the most immediate claim at the time. CP 1094, 1132. Enumclaw originally filed an Answer and Counterclaims relating solely to the Barrington project but subsequently amended the Counterclaim to cover all of the claims against Sundquist, including Red Oaks. CP 1081-1087, 1133.

Sundquist and Red Oaks scheduled a mediation on March 4, 2004. Three days before the mediation, Mr. Michlitsch reiterated Enumclaw's position that the Red Oaks claim was not covered under the policy, and no insurance money would be available to fund a settlement. CP 940, p. 26 l. 5 – p. 27 l. 22. Red Oaks filed its action against Sundquist on March 31st and settled with Sundquist two days later, by exchanging a covenant not to execute on its Stipulated Judgment of $1,948,000 against Sundquist for an assignment of any rights Sundquist may have had against Enumclaw for the Red Oaks claim. *Red Oaks COA v. Sundquist Homes, Inc.*, 128 Wn. App. 317, 320, 116 P.3d 404 (2005).

Red Oaks then brought this action against Enumclaw alleging coverage under the policies and bad faith[1]. CP 1-13. In two Summary Judgment Motions Enumclaw obtained rulings there was no coverage under the policies for Red Oaks' claims. CP 700-702, 898-900. Ultimately, the court found that there was no coverage because of the

[1] At Red Oaks' request, Enumclaw agreed to transfer its then-pending counterclaims against Sundquist regarding coverage to the new lawsuit filed by Red Oaks.

policy's exclusion for the "insured's work." Without having earlier raised its bad faith estoppel defenses to resist the previous summary judgment motions, Red Oaks brought a Summary Judgment Motion based on bad faith. CP 170-183, 795-809, 901-929. Red Oaks' Motion was denied and a Summary Judgment of Dismissal granted to Enumclaw. CP 1316-1318. The Court of Appeals affirmed in all respects.

IV. ARGUMENT

Red Oaks petitions for review on two bases: First, that the Court of Appeals decision is allegedly contrary to this Court's precedent that ambiguities in insurance policies must be resolved in favor of coverage (RAP 13.4(b)(1)); and Second, that there is a substantial public interest in the dispute such that it should be resolved by the Supreme Court (RAP 13.4(b)(4)). As will be demonstrated below, the Court of Appeals correctly applied the law established by this Court, and the public's interest in a correct resolution of insurance issues was vindicated by the Court of Appeals. This Court should deny Red Oaks' Petition for Review.

1. The Work exclusion unambiguously prevents coverage

In Red Oaks' pre-litigation claims, and subsequent lawsuit against Sundquist, it claimed that Sundquist was liable for *all* of the property damage at the condominiums. An insured builder's "work" is the building it constructs. *Federated Service Ins. Co. v. R.E.W. Inc.* 53 Wn. App. 730,

770 P.2d 654 (1989). In *R.E.W.* the insurer declined to cover the loss, citing, among others, the Insured's Work exclusion, word for word the same exclusion in Enumclaw's Umbrella Policy. *Id.* at 732; CP 87. The court held coverage was excluded[2]. *Id.* at 736. The same is true in this case. The Work exclusion states that the insurance does not apply:

> With respect to the **Completed Operations Hazard** to Property Damage to work performed by the Named Insured . . . CP 87.

Red Oaks argues that this exclusion can reasonably be read to mean the policy covers liability for property damage to work performed by Sundquist's subcontractors, excluding only work that Sundquist's own employees performed. Red Oaks thus suggests that the exclusion is ambiguous, and should be construed to provide subcontractor coverage.

However, the simple fact that Red Oaks alleges an ambiguity exists does not make it so[3]. The Court of Appeals ruled that the condominiums were the "work" of Sundquist, and provided a detailed analysis of why Red Oaks' interpretation is *not* reasonable. That analysis is based, appropriately, on what that Court termed "the realities of

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[2] Washington recognizes and enforces the distinction between uninsured business risks like the quality of a contractor's product, and insured liability to third parties caused by the contractor's negligently constructed product. *Harrison Plumbing & Heating, Inc., v. New Hampshire Insurance Group*, 37 Wn. App. 621, 625-626, 681 P.2d 875, (1984).

[3] "[D]isagreement as to the clause's ambiguity cannot itself establish ambiguity. Disagreement as to the existence of a thing cannot prove its existence, whether the thing is ambiguity or anything else." *Farmers Alliance Mut. Ins. Co. v. Miller*, 869 F.2d 509, 512 (9th Cir. 1989).

commercial construction." Those realities revolve around the legal and practical roles of a general contractor such as Sundquist.

> [T]he policy-holder was the party in control of, and responsible for, the quality of work performed by a subcontractor. . . [The general contractor] undertook construction. . . and was obligated by the contract to perform that work in a satisfactory manner. The fact that it subcontracted out some of the work on the project did not relieve it of its contractual obligation to produce a product free of defects and faulty workmanship. . . . Under Washington law, once an operation is completed, the work of the subcontractors has merged with the work of the general contractor. . .
>
> *Pet. for Rev. Append. A at 7*

This "merger" principle is an analysis of the type of liability asserted against Sundquist as the party in ultimate control of the construction of the condominiums. It acknowledges that a general contractor's reason for being, as a matter of reality and law, is to assume total responsibility for construction[4]. And as discussed above, it is against the insured's *liability* that coverage under the policy is measured. This characterization of a general contractor's liability has been the established rule in Washington since this Court denied review of the case of *Schwindt v. Underwriters at Lloyds of London*, 81 Wn. App. 293, 914 P.2d 119 (1996). In *Schwindt*, the Court of Appeals ruled:

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[4] "The point of hiring a general contractor for a construction job is for the general to manage the job and hire the subcontractors. The owner does not deal directly with the subcontractors, and often is unaware of the identity of the subcontractors." *D.J. Painting Inc. v. Baraw Enters.*, 172 Vt. 239, 245 (2001).

> [T]he named insured is the general contractor and work performed by the insured must necessarily be such work as the named insured is required to perform under the construction contract. . . The contractor can employ subcontractors or use employees to do the work, but in the end, when the work is complete, all the work called for by the contract on the part of the contractor must be deemed to be work performed by the contractor.
>
> *Id. at 30, cf Blaylock & Brown Constr., Inc. v. AIU Ins. Co.*, 796 S.W.2d 146, 153 (Tenn. App. 1990).

There is plentiful support for this proposition in other jurisdictions. One such example is the Pennsylvania case of *Ryan Homes v. Home Indem. Co.*, 436 Pa. Super. 342, 353 (1994):

> Appellant undertook to construct homes and furnish the buyers with good quality residential structures. To assist it in doing so, appellant employed subcontractors to do some of the work. When it did so, the subcontractors were required to meet, and appellant was required to enforce, standards of good workmanship. When appellant purchased general liability coverage, language of the policy excluded coverage for a failure of the completed home to comply with the workmanship which the buyers had a right to expect under the terms of their contracts with appellant. For such liability, the trial court properly held, there was no coverage under the terms of appellant's general liability policies of insurance.

Minnesota agrees. *Knutson Constr. Co. v. St. Paul Fire & Marine Ins. Co.*, 396 N.W.2d 229, 236 (1986):

> When the completed project is turned over to the owner by the general contractor, all of the work performed and materials furnished by subcontractors merges into the general contractor's product -- a product it has contracted to complete in a good workmanlike manner. . . . The completed product is to be viewed as a whole, not as a "grouping" of component parts.

Additionally, courts in Maine[5], Florida[6] and Delaware[7] are all in accord with the Washington position, articulated in *Schwindt*, that the work of subcontractors merges into the work of the general contractor for purposes of the Work exclusion as a matter of law[8]. This conclusion conforms to Washington law, as articulated by this Court's decision in *Honeywell, Inc. v. Babcock*, 68 Wn.2d 239, 243 (1966): "The general contractor [is] responsible to the owner for the satisfactory and full completion of the subcontractors' work under the contract."

2. The omission of "or on behalf of" language in the endorsement does not create coverage for liability for damage to the work of subcontractors.

Red Oaks puts substantial weight on the fact that the Work exclusion in the Umbrella endorsement is phrased differently than the Work exclusion in the basic Umbrella policy. The basic policy provides that there is no coverage for liability for property damage to:

> work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith; CP 75.

The Endorsement replaces *pages* of Umbrella exclusions "relating

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[5] *Baywood Corp. v. Maine Bonding & Casualty Co.*, 628 A.2d 1029 (Me. 1993).

[6] *Tucker Constr. Co. v. Michigan Mut. Ins. Co.*, 423 So. 2d 525, 528 (Fla. App. 1982).

[7] *Vari Builders, Inc. v. United States Fidelity & Guaranty Co.*, 523 A.2d 549 (Del. Super. Ct. 1986).

[8] But see *Fireguard v. Scottsdale Ins.*, 864 F.2d 648 (9th Cir. 1988), relying on what it perceived to be the insurer's "intent." *Fireguard* was specifically disapproved in *Scwindt*, and in the case at bar. As will be discussed, such "intent" evidence is irrelevant in this case under Washington law.

to property damage" with half a page of new ones, including:

> With respect to the **Completed Operations Hazard** to Property Damage to work performed by the Named Insured arising out of the work or any portion thereof, or out of any materials, parts or equipment furnished in connection therewith. CP 87.

Red Oaks argues that the Court of Appeals failed to give meaning to the omission of 'or on behalf of' in the Endorsement. Again, it is critical to analyze *liability coverage* in relation to *liability asserted* in a Complaint. Consider two possible allegations in a Complaint:

> 1. Sundquist is liable for the defective construction work performed **by** Sundquist while building the Red Oaks condominiums.
>
> 2. Sundquist is liable for the defective construction work performed **by or on behalf of** Sundquist while building the Red Oaks condominiums.

The difference between these two allegations is absolutely immaterial, because as the general contractor, Sundquist was responsible for the entire project as a "reality of commercial construction." The superfluity noted by the Court of Appeals reflects the fact that this difference in language bears no relationship to any difference in liability. The first version of the allegation charges Sundquist with liability for its subcontractor's work just as clearly as the second. Similarly, the Endorsement's Work exclusion excludes subcontractor liability as clearly as the Umbrella's. There is no ambiguity. Once the operation is

completed, the work of the subcontractors has merged with the work of the general contractor[9].

Because the exclusionary language denied coverage for property damage arising out of the insured's work, and *all* of the work was the insured's work upon completion, there was no coverage for damage to that work.

3. Evidence of "Intent" is Irrelevant Where Policy Language is Clear.

Red Oaks also makes the awkward argument that the Court of Appeals created an "unprecedented new burden" on the insured to "prove the insurer's intent to provide coverage." The basis for the Court of Appeals' decision was that the Work exclusion had a plain meaning. Enumclaw has consistently relied on the plain meaning of the policy. As this Court recently held in *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 186, 110 P.3d 733 (2005), "Washington law clearly requires this court to look first to the plain language of an insurance policy exclusion. If the exclusionary language is unambiguous, then the court cannot create an ambiguity where none exists. If the language is plain there is no need to consider extrinsic evidence of the parties' intent."

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[9] Whether the work was 'done by' or 'on behalf of' the general contractor is irrelevant to the analysis. *The completed product* is to be viewed as a whole, not as a 'grouping' of component parts. *Schwindt*, 81 Wn. App. at 306 (emphasis added).

It was Red Oaks, not Enumclaw, that sought to deviate from that plain meaning on the basis of "intent" evidence[10]. But Red Oaks failed to present any such evidence. As this Court held in *Dwelley v. Chesterfield*, 88 Wn.2d 331 (1977), the party asserting a mutual intention that a policy mean something other than what it says has the burden of proving that intention. This is not an "unprecedented new burden." It is a traditional, old burden, and Red Oaks did not meet it.

4. Red Oaks' Bad Faith Claim was Properly Dismissed.

Red Oaks argues that Enumclaw violated *Tank's* enhanced duty of good faith and fair dealing by failing to comply with *Tank's* "explicit instruction." *Pet. for Rev. at 11.* However, which "explicit instruction" Red Oaks alleges Enumclaw violated is far from clear. Generally, Red Oaks argues that Enumclaw engaged in an action that demonstrated greater concern for its own financial interest than that of Sundquist, but the *only* action Red Oaks points to is the fact that Enumclaw declined to

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[10] Red Oaks suggests that the difference in language between the basic Umbrella policy and the endorsement creates an ambiguity. That reasoning was rejected in the case of *Ryan v. Harrison*, 40 Wn. App. 395, 399, 699 P.2d 230 (1985). "It is contended that the deleted exclusion [5] was inconsistent with exclusion 4 and thus renders the policy ambiguous. We disagree. When no ambiguity exists in the language of the contract, all conversations, contemporaneous negotiations, or other agreements between the parties prior to the written agreement are merged therein and thus are not admissible for the purpose of contradicting, subtracting from, adding to, or varying the terms of the written agreement. Since exclusion 5 is not a part of the policy, it should not be considered in construing it."

pay indemnity dollars at a mediation, based on Enumclaw's legitimate belief that it owed no indemnity dollars. *Pet. for Rev. at 10-12.*

What Red Oaks is really arguing is that an insurer defending under a reservation of rights is obligated, by the duty of good faith and fair dealing, to waive coverage defenses and pay indemnity dollars just because doing so would be in the insured's best financial interests. This would be a dramatic, unprecedented shift in the law.

a. Providing a Defense under a Reservation of Rights is a Valuable Service to the Insured.

If the insurer defends under a reservation of rights, a conflict of interest naturally arises with the insured as to how the defense should be conducted. Therefore, when an insurer defends under a reservation of rights, courts have held that the insurer must make the insured aware of its position on coverage and provide the insured with an attorney whose sole accountability is to the insured. The purpose of these requirements is so that the insured can make informed decisions regarding its own defense. *Tank v. State Farm Fire & Casualty Co.*, 105 Wn.2d 381, 388-389, 715 P.2d 1133 (1986). Courts have termed the insurer's obligation of fairness in the reserved rights context the "enhanced obligation of good faith." Id. at 387-388.

Nevertheless courts have made it clear that they have no intention

of encouraging insurers to deny coverage rather than defend subject to a reservation. *Id.* at 391. In Washington, "A reservation of rights is a means by which the insurer avoids breaching its duty to defend while seeking to avoid waiver and estoppel. When that course of action is taken, the insured receives the defense promised and, if coverage is found not to exist, the insurer will not be obligated to pay." *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 761, 58 P.3d 276 (2003) (citations omitted). The *Tank* enhanced obligation of good faith requires the insurer to provide the insured with a fair defense, but does not require any concession regarding any duty to pay. "In a reservation-of-rights setting, an insured's sole entitlement is to a fair and coverage-neutral defense. . . . [A]n insured does not have a right to force the insurer to waive its legitimate right to litigate coverage issues." Thomas V. Harris, Washington Insurance Law § 17-1 (2003). Enumclaw's position that it was entitled to a judicial declaration of coverage before it paid a claim based on a well founded coverage defense is entirely consistent with Washington law, and did not violate its duty to consider the insured's interests.

b. Insurers Can Reserve Rights and Litigate Coverage Issues even After Judgment is Entered Against the Insured.

Contrary to Red Oaks position, an insurer often has an obligation,

not just a right, to wait for a resolution of the underlying action prior to even filing the coverage lawsuit, because "it would be inappropriate for an insurer to use the declaratory judgment process to litigate issues that might establish its insured's tort liability." Thomas V. Harris, Washington Insurance Law § 14-2 (2003), *Mutual of Enumclaw v. Dan Paulson Constr., Inc.* __ Wn.2d __, 169 P.3d 1 (2007). That concern would have been particularly acute in this case, where Enumclaw would have had to prove that Sundquist's workmanship was faulty prior to such a determination in the underlying case. Had Enumclaw prevailed, Sundquist would have been left both without coverage, and collaterally estopped to deny liability to Red Oaks. The Court of Appeals correctly ruled that Enumclaw's decision not to fund the settlement was not bad faith; the decision should not be disturbed.

5. Red Oaks' WAC Violation Claim was Properly Dismissed.

Red Oaks leaves the clear impression that Enumclaw "admitted" to violating the WAC because Enumclaw did not challenge *facts* asserted by Red Oaks[11]. On the contrary, Enumclaw has always denied that those facts even approach a violation of the WAC. The Court of Appeals finding of no violation was not "inexplicable"; it was the only legally correct result.

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[11] "MoE stipulated to facts that it failed to comply with the WAC." *Pet. for Rev. at 3.*

Red Oaks alleges that Enumclaw violated two WAC provisions: 284-30-330(13)[12] and 283-30-380(1)[13]. There are at least two reasons why 330(13) has no application to this case. First, Enumclaw *did not deny coverage*; it accepted the tender under a reservation of rights. The regulation requires an insurer to explain the basis for an offer to compromise a coverage dispute or a decision to deny coverage. WAC 284-30-330(13). As a result of having reserved rights there was neither an offer of compromise nor a denial of coverage to explain. Second, even though the regulation does not apply to this circumstance, Enumclaw did explain its coverage position to Sundquist in some detail in the letters reserving its rights. CP 44-49, 1119-1121.

With respect to 380(1), a primary observation is that it applies only to first party claims, not third party claims like this one. Once again, Enumclaw did not deny Sundquist's claim. But Enumclaw did tell Sundquist exactly why it intended to challenge coverage, including its reliance on the Work exclusion. 380(1) is of no application to this case,

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[12] WAC 284-30-330(13): Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

[13] WAC 284-30-380(1): Within fifteen working days after receipt by the insurer of properly executed proofs of loss, the first party claimant shall be advised of the acceptance or denial of the claim by the insurer. No insurer shall deny a claim on the grounds of a specific policy provision, condition, or exclusion unless reference to such provision, condition, or exclusion is included in the denial. The denial must be given to the claimant in writing and the claim file of the insurer shall contain a copy of the denial.

and the Court of Appeals correctly affirmed the trial court's dismissal.

6. The Faulty Workmanship Exclusion Precludes Coverage.

The Work exclusion standing alone is sufficient to exclude Red Oaks' claim, but there is a second exclusion contained in Sundquist's Umbrella Policy that operates to deny coverage for Red Oaks' claim: the Faulty Workmanship exclusion. The Court of Appeals did not reach this issue, but if this Court reverses that decision, the Faulty Workmanship exclusion must be applied. There is no coverage for property damage to:

> that particular part of any property . . . the restoration, repair or replacement of which has been made or is necessary by reason of faulty workmanship thereon by or on behalf of the Insured. (CP 87)

Washington case law has established that, "that particular part on which the insured worked" means a general contractor's entire structure. This point was explored in *Schwindt, v. Underwriters at Lloyds of London*, 81 Wn. App. 293, 914 P.2d 119 (1996). In *Schwindt*, defects in the workmanship of the general contractor and its subcontractors resulted in extensive consequential property damage to the building. *Id.* at 295 – 296. The Lloyds exclusion also contained the "that particular part" language that is crucial to an interpretation of Enumclaw's Faulty Workmanship exclusion. The Lloyds exclusion prohibited coverage:

> for damage **to that particular part** of any property upon which the Assured is or has been working caused by the

faulty manner in which the work has been performed. . . .
(*Id.* at 295 (Emphasis added))

The assured argued that this exclusion does not "extend to claims of bad work or bad use of material resulting in damage beyond the removal and replacement of the **particular item** of defective work." *Id.* at 302. (Emphasis added.) Disagreeing, the Court found that "because this damage is still a part of the defective building itself, it falls within the policy exclusions." *Id.* at 303-04. Thus the faulty work exclusion eliminated not only coverage for the poor wiring and poor waterproofing, but also the resulting consequential damage to a chiller and floor tiles (respectively). *Id.* at 304. This was so because when the insured is a general contractor, the *entire structure* is "that particular part" of property upon which the insured is working. *Id.* at 304 – 305. The application of the faulty workmanship exclusion in the case at bar is nearly identical to the application of Lloyd's faulty work exclusion in *Schwindt*. Sundquist was the general contractor, and poor workmanship allowed water to enter and caused other damage. Because the entire condominium structure was "that particular part," the exclusion prevents coverage for property damage to the entire condominium. The Faulty Workmanship exclusion unambiguously prevents coverage for Sundquist's liability. If the Court accepts review and reverses the Court of Appeals decision on the Work

exclusion, the Court should rule that this damage is excluded by the Faulty Workmanship exclusion.

7. Red Oaks Waived Its "Bad Faith Estoppel" Affirmative Defense And Should Not Be Allowed To Raise It To Establish Coverage.

Based on its bad faith claim Red Oaks seeks to estop Enumclaw from using policy exclusions that prevent coverage. Red Oaks first raised this issue after two Enumclaw Summary Judgments determined there was no coverage under Sundquist's policies. CP 700-702, 898-900, 901-929.

As Enumclaw argued in the trial court, Red Oaks was required to bring its estoppel by bad faith argument as a defense to Enumclaw's Summary Judgment Motions. CP 1095 Estoppel is an affirmative defense. CR 8 (c). If the non-moving party can bring an affirmative defense to avoid a summary judgment it must do so or the affirmative defense is waived. *Diversey Lever, Inc. v. Ecolab, Inc.*, 191 F.3d 1350 (D.C. Cir. 1999).

V. CONCLUSION

The Court should deny Red Oaks' Petition for Review. If the Court accepts the petition and reverses, however, the Court should uphold the Court of Appeals decision on the alternate grounds provided above.

RESPECTFULLY SUBMITTED this 17th day of December, 2007.

HACKETT, BEECHER & HART

/s/*

Brent W. Beecher, WSBA #31095
Attorneys for Mutual of Enumclaw
* Original Signature on File

OFFICE RECEPTIONIST, CLERK

To: Nancy Boyd
Subject: RE: 80937-2 Answer to Petition for Review

Rec. 12-17-07

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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Sent: Monday, December 17, 2007 4:55 PM
To: OFFICE RECEPTIONIST, CLERK; ken@condolaw.net
Subject: 80937-2 Answer to Petition for Review

Dear Clerk,

This time the document is attached and a copy is also being sent to Ken Harer. They are copied on this e-mail. The attached document is identical.
Enclosed for filing is Mutual of Enumclaw's Answer to Petition for Review with Certificate of Service in the case of:

Mutual of Enumclaw Ins. Co. v. Red Oaks Condominium Owners Association, Supreme Court No. 80927-2.

Thank you.

Filed by Brent Beecher
WSBA 31095
bbeecher@hackettbeecher.com